



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

██████████, Respondent

DECISION

Case #: FOF - 174528

Pursuant to petition filed May 20, 2016, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Office of the Inspector General to disqualify ██████████ from receiving FoodShare benefits (FS) one year, a phone hearing was held on Thursday, July 7, 2016.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

Office of the Inspector General
Department of Health Services - OIG
PO Box 309
Madison, WI 53701

By: ██████████, PARIS Agent

Respondent:

██████████
██████████
██████████

█

ADMINISTRATIVE LAW JUDGE:

Mayumi M. Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # ██████████) is a resident of Milwaukee County who received FS benefits from August 2012 through December 2014. (Exhibit 8)

2. On June 6, 2016, the Office of Inspector General prepared an Administrative Disqualification Hearing Notice alleging that the Respondent provided false information between August 1, 2012, and December 31, 2014, in order to obtain SNAP benefits to which he was not entitled. (Exhibit 1)

DISCUSSION

Respondent's Non-appearance

The Respondent did not appear for this hearing. This circumstance is governed by the regulation in 7 C.F.R. §273.16(e)(4), which states in part:

If the household member or its representative cannot be located or fails to appear at a hearing initiated by the State agency without good cause, the hearing shall be conducted without the household member being represented. ***Even though the household member is not represented, the hearing official is required to carefully consider the evidence and determine if intentional Program violation was committed based on clear and convincing evidence.*** If the household member is found to have committed an intentional program violation but a hearing official later determines that the household member or representative had good cause for not appearing, the previous decision shall no longer remain valid and the State agency shall conduct a new hearing. The hearing official who originally ruled on the case may conduct a new hearing. In instances where the good cause for failure to appear is based upon a showing of nonreceipt of the hearing notice, the household member has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. In all other instances, *the household member has 10 days from the date of the scheduled hearing to present reasons indicating a good cause for failure to appear. A hearing official must enter the good cause decision into the record.*

Emphasis added

The hearing in this case took place on July 7, 2016. The Respondent was advised of the date and time of the hearing, in an Administrative Disqualification Hearing Notice that was sent to him at an address in Milwaukee, even though the agency believes he moved out of state.

██████████ indicated that the address used was the last address the Respondent reported, before his case closed in December 2014. It is unclear what efforts the agency made to secure a more current address. ██████████ indicated that there was no returned mail.

An attempt was made to contact the Respondent at (414) ██████████, but there was only a busy signal. So, the hearing proceeded in his absence. The Respondent did not make himself available for the hearing and the Respondent did not contact the Division of Hearings and Appeals within 10 days to explain his failure to appear.

What is an Intentional Program Violation?

7 C.F.R. §273.16(c) states that Intentional Program Violations “shall consist of having intentionally: 1) Made a false or misleading statement or misrepresented facts; or 2) Committed an act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any State statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of coupons, authorization card or any other reusable documents used as part of an automated delivery system (access device).”

The Department's written policy restates federal law, below:

3.14.1 IPV Disqualification

7 CFR 273.16

A person commits an Intentional Program Violation (IPV) when s/he intentionally:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts; or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

An IPV may be determined by the following means:

1. Federal, state, or local court order,
2. Administrative Disqualification Hearing (ADH) decision,
3. Pre-charge or pretrial diversion agreement initiated by a local district attorney and signed by the FoodShare recipient in accordance with federal requirements, or
4. Waiver of the right to an ADH signed by the FoodShare recipient in accordance with federal requirements.

FoodShare Wisconsin Handbook, §3.14.1.

The agency may disqualify only the individual who either has been found to have committed the IPV or has signed a waiver or consent agreement, and not the entire household. If disqualified, an individual will be ineligible to participate in the FS program for one year for the first violation, two years for the second violation, and permanently for the third violation. However, any remaining household members must agree to make restitution within 30 days of the date of mailing a written demand letter, or their monthly allotment will be reduced. 7 C.F.R. §273.16(b).

What is OIG's burden of Proof?

In order for the agency to establish that a FoodShare recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit an intentional program violation per 7 C.F.R. §273.16(e)(6).

"Clear and convincing evidence" is an intermediate standard of proof which is more than the "preponderance of the evidence"(a.k.a. "more likely than not") used in most civil cases and less than the "beyond a reasonable doubt" standard used in criminal cases.

In Kuehn v. Kuehn, 11 Wis.2d 15, 26 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. In criminal cases, while not normally stated in terms of preponderance, the necessary certitude is universally stated as being beyond a reasonable doubt.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that "yes" should be the answer because of its greater weight and clear convincing power.

“Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that “it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4th ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence, a firm conviction as to the existence of each of the two elements even though there may be a reasonable doubt that the elements have been shown.

The Merits of OIG’s Case

In the case at hand, the Office of the Inspector General (OIG) asserts that the Respondent violated the rules of the FoodShare Program by lying about being a Wisconsin resident between August 2012 and December 31, 2014.

“A household shall live in the State in which it files an application for participation” in the food stamp program. 7 *CFR* §273.3(a)

In order to prevail in a case such as this, OIG must provide:

1. The applications from just before the IPV was committed and from the period in question to show that the Respondent received warnings about the penalties for providing false information and to show what the Respondent reported to the agency;
2. Page 2 of the Eligibility and Benefits Booklet, along with the CARES Correspondence History Search Result, also provides evidence that the Respondent was warned about the penalties for providing false information or breaking the rules.
3. Six month report forms during the time in question, to prove what the Respondent reported to the agency;
4. The case comments for the time in question to show what the Respondent reported to the agency;
5. Reliable documentation from the period in question and/or testimony from individuals with knowledge of the Respondent’s living situation, to prove the Respondent was living outside Wisconsin.
6. When EBT usage is relied upon, it must include the EBT card number used, the date of transaction, the merchant FNS number, the location of the merchant and a print off showing that the EBT cards in the report were actually issued to the Respondent.

In this case, OIG’s case fails primarily, because it has not provided adequate evidence to prove the Respondent was not living in Wisconsin. The only evidence OIG provided to show the Respondent was out of state was a Client Summary / Transaction Summary in Exhibit 9. OIG asserts that the Respondent’s EBT card usage proves he had to be living out of state. However, there is nothing in the record tying all six of the EBT cards that were used in the transactions listed in Exhibit 9 to the Respondent. Only 1 card was shown to be issued to the Respondent and that card was used only on one date, November 19, 2014 the other five cards are not tied to the Respondent. Additionally, OIG did not include any documentation from FNS identifying to whom the FNS numbers belonged, so there is no way to know whether the merchants listed in Exhibit 9 were located out of state.

CONCLUSIONS OF LAW

OIG has not met its burden to prove the Respondent committed an IPV between August 1, 2012 and December 31, 2014.

NOW, THEREFORE, it is ORDERED

IPV case number [REDACTED] is hereby reversed.

REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

APPEAL TO COURT

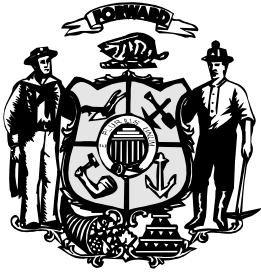
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as “PARTIES IN INTEREST” **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,
Wisconsin, this 22nd day of July, 2016

\sMayumi M. Ishii
Administrative Law Judge
Division of Hearings and Appeals

c: Office of the Inspector General - email
Public Assistance Collection Unit - email
Division of Health Care Access and Accountability - email
[REDACTED] - email



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on July 22, 2016.

Office of the Inspector General
Public Assistance Collection Unit
Division of Health Care Access and Accountability
[REDACTED]@wisconsin.gov